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No. 07-1249 (2)

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In the Supreme Court of the United States

SONYA DENIECE RANKIN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Court of Appeal misapply *Cunningham* v. *California*, 549 U.S. 270 (2007), *United States* v. *Booker*, 543 U.S. 220 (2005), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), by concluding that the discretionary decision whether to run sentences on multiple counts consecutively rather than concurrently does not violate the right to jury trial where, under California state law, there is no presumption of concurrent sentencing and no requirement of judicial factfinding to impose a consecutive sentence?

2. Did the California Court of Appeal misapply the recidivism exception to the jury trial requirement for prior convictions as set out in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), by holding that the trial court could properly find whether a defendant's convictions were increasingly serious?

3. Did the California Supreme Court in *People* v. *Sandoval*, 41 Cal. 4th 825, 161 P.3d 1146, 62 Cal. Rptr. 3d 588 (2007), violate petitioner's federal constitutional right to be free from ex post facto legislation by judicially reforming California Penal Code section 1170(b) to eliminate the requirement that a trial court find an additional fact in order to impose an upper term, and directing trial courts to conduct *Cunningham* resentencings under this reformed system, even though petitioner was never sentenced under this reformed system?

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In the Supreme Court of the United States

No. 07-1249

SONYA DENIECE RANKIN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

1. Petitioner, Sonya Rankin, was charged by information with two counts of conspiracy, Cal. Penal Code § 182(a)(1) (counts 1, 11), eleven counts of grand theft, Cal. Penal Code § 487(a) (counts 2-9, 12-14), and possession of stolen property, Cal. Penal Code § 496 (count 10). The information further alleged the offenses involved a pattern of fraudulent conduct and involved a taking of over $500,000, Cal. Penal Code §§ 186.11(a)(1)-(2)), 1203.045(a), 12022.6, and petitioner was on bail when she committed counts 11 through 14, Cal. Penal Code § 12022.1. (C.T. 413-20.)

Prior to the start of trial, the prosecution provided notice of five factors in aggravation to be proved to the jury for purpose of seeking upper terms and consecutive sentences. (C.T. 288-89.) Those five factors were: petitioner induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission, Cal. Ct. R. 4.421(a)(4), the manner in which the crime was carried out indicates planning, sophistication, or professionalism, Cal. Ct. R.

4.421(a)(8), the crime involved an attempted or actual taking or damage of great monetary value, Cal. Ct. R. 4.421(a)(9), the crime involved a large quantity of contraband, Cal. Ct. R. 4.421(a)(10), and the crime involved an abuse of a trusted position, Cal. Ct. R. 4.421(a)(11). (C.T. 288-89.)

2. A jury found petitioner guilty on all counts and allegations, except count 9, upon which the jury was unable to reach a verdict. (C.T. 447-82.) At a bifurcated trial, the jury found the five charged aggravating circumstances true beyond a reasonable doubt. (C.T. 447, 520-22.)

3. Grand theft is punishable by a term of imprisonment of 16 months, two years, or three years. Cal. Penal Code §§ 18, 489(b). On January 5, 2006, the court imposed a three-year upper term on count 5, consecutive eight-month terms for counts 2, 3, 4, 6, 7, 8, 10, 12, 13, and 14, a consecutive three-year term for the enhancement for engaging in a pattern of fraudulent conduct involving a taking over $500,000, and a consecutive two-year term for the on-bail enhancement, for a total prison term of fourteen years, eight months. (C.T. 544-49; R.T. 4530-33.)[1/]

In selecting these terms, the court relied on the five aggravating factors found by the jury. It also found four additional factors by a preponderance of the evidence, three of which involved recidivism. The court found petitioner suborned perjury by writing a letter to her husband asking him to lie for her at trial, Cal. Ct. R. 4.421(a)(6), her prior offenses were of increasing seriousness, Cal. Ct. R. 4.421(b)(2), she was on probation for a prior offense at the time she committed the current offenses, Cal. Ct. R. 4.421(b)(4), and her performance on

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1. A codefendant was also found guilty of one count of grand theft and was sentenced to the upper term of three years. (C.T. 447-82; R.T. 4343-48.)

probation was necessarily poor, Cal. Ct. R. 4.421(b)(5). (R.T. 4530-33.)

4. The California Court of Appeal affirmed petitioner's judgment and sentence on October 26, 2007, in an unpublished opinion. (Pet. App. 1.) The California Supreme Court denied review on January 3, 2008. (Pet. App. 5.)

ARGUMENT

I.

PETITIONER ENJOYED THE RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT FOR THE AGGRAVATING CIRCUMSTANCE THAT SERVED AS A CONSTITUTIONALLY VALID BASIS FOR IMPOSITION OF CONSECUTIVE TERMS

1. Petitioner first asks this Court to grant a writ of certiorari in this case in light of the recent grant of certiorari in *Oregon* v. *Ice*, No. 07-901. The issue presented in *Ice* is: "Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely* v. *Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant." *Oregon* v. *Ice*, 128 S. Ct. 1657 (2008). Petitioner asserts the imposition of consecutive sentences in her case presents the same constitutional question under *Apprendi* and *Blakely* as in *Ice*. Petitioner is incorrect. Unlike the defendant in *Ice*, petitioner received a jury trial on the aggravating factor relied on by the trial court in imposing consecutive sentences.

The trial court explained its sentencing decision as follows:

I have considered the aggravating and mitigating circumstances, and those set forth by the findings of the jury which are under 4.421, the Rules of Court, subdivision (a) subsection (4), that the defendant induced others to participate in this crime; (8), that there was demonstrated planning and professionalism in the commission of the crime or crimes; (9), that there was a su stantial loss; (10), that there was a large quantity of contraband; and then (11), the defendant abused the position of trust. Those were all findings made by the jury. In addition, there is a (6), that the defendants have suborn[ed] perjury.

I do agree with [the prosecution] that the only reasonable characterization of that letter is such. That was not a finding made by the jury. I'm not sure that's any longer required under the law that a jury make a finding.

I do find that factor exists by a preponderance of evidence.

And then under section – subdivision (b), excuse me, subsection (2) that the defendant's convictions are of increasing seriousness; (4), that she was on probation at the time of these offenses; and (5), that her performance on probation was obviously then poor.

Those are not factors that I believe under – even under previous law need to have been made by the jury, because they go to the defendant's criminal history rather than to the facts of the case.

So those are all the aggravating circumstances that I believe exist in this matter. I've suggested 4.423 of the Rules of Court which outline the statutory mitigating circumstances and find that none of them apply in these circumstances. Beyond that, I have certainly considered the defendant and her circumstances, as I am required to do beyond the

> factors set forth in that code section, and have certainly considered her own – her letters to the Court as well as those written by friends and family.
>
> I do find that the aggravating circumstances outweigh the mitigating substantially so, in particular, that she was on probation for a similar offense at the time. This offense is the chief factor that I have in mind, as well as the subornation of perjury factor as well. On that basis I will select the aggravated term for Count 5 which is a grand theft count of 3 years. Based upon the abuse of a position of trust, I will order that consecutive sentences be served for the following counts: 2, 3, 4, 6, 7, 8, and 10, as well as 12, 13 and 14.

(R.T. 4530-32.)

Abuse of a position of trust was one of the facts found true by the jury beyond a reasonable doubt. (C.T. 521.) Accordingly, to the extent the Sixth Amendment requires that any fact used to impose consecutive sentences be proved to a jury beyond a reasonable doubt, that requirement was necessarily satisfied in petitioner's case.

2. Petitioner does not dispute that a jury found this factor true beyond a reasonable doubt. Instead, she claims in her fourth argument that the jury findings upon which the court relied cannot satisfy the Sixth Amendment jury trial requirement described in *Apprendi* and *Blakely* because the trial court lacked authority under state law to direct the jury to make such findings. Pet. at 26. Petitioner's claim is unavailing. Petitioner did not object at trial to the use of this procedure for finding aggravating factors (R.T. 4081), and has therefore forfeited any claim of procedural error. See *In re Carlos B.*, 76 Cal. App. 4th 50, 55-56, 90 Cal. Rptr. 2d 72, 76 (1999) (acquiescence in court procedure constitutes forfeiture of any claim of impropriety of procedure).

3. Petitioner's claim asserts nothing more than an alleged error of state procedure, rather than a constitutional violation. Certiorari is not warranted to resolve a dispute over state law. Petitioner's claim also fails because it is based on an incorrect assessment of state law. In *Cunningham* v. *California*, 549 U.S. 270, ___, 127 S. Ct. 856, 868-71 (2007), this Court concluded that California's procedures for imposing an upper term sentence violated the Sixth Amendment by assigning to the trial court, rather than a jury, the function of finding aggravating factors used to impose an upper term. *Cunningham*, however, left it to California to select the appropriate method for resolving the constitutional flaw, either by charging juries with the task of finding aggravating factors, or by giving trial courts broader discretion to select the upper term. *Id.* at ___, 127 S. Ct. at 859.

When faced with a determination that a state procedure is constitutionally invalid, California courts are statutorily granted the authority to create new procedures to fill the void. Under Section 187 of the California Code of Civil Procedure, a trial court has the authority to put into effect "all the means necessary" to carry out any statutory or constitutional mandate. Section 187 specifically adds that, in the exercise of this jurisdiction, "if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." This section has been held applicable to criminal proceedings. See, *e.g.*, *Telegram Tribune, Inc.* v. *Municipal Court (Rose)*, 166 Cal. App. 3d 1072, 1077-79, 213 Cal. Rptr. 7, 10-12 (1985). The California Supreme Court has long held that the courts not only have the power to devise necessary procedures to enable statutory schemes, they have a duty to do so. See *People* v. *Jordan*,

65 Cal. 644, 646, 4 P. 683, 684 (1884) ("In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases . . . ."); see also *People* v. *Chew Lang Ong*, 141 Cal. 550, 552-53, 75 P. 186, 187-88 (1904); *People* v. *Walker*, 33 Cal. 2d 250, 265-66, 201 P.2d 6, 15-16 (1949); *People* v. *Hyde*, 49 Cal. App. 3d 97, 101-04, 122 Cal. Rptr. 297, 302-02 (1975); see generally 2 Witkin, California Procedure § 190 (4th ed. 1997) ("[I]t is generally conceived to be more than a power, being described in terms of a duty to exercise jurisdiction by devising a procedure that will permit of its exercise. Both concepts—power and duty—are stated in C.C.P. 187.").

Here, the trial court undertook its duty to adopt a procedure which satisfied the constitutional problem identified in *Cunningham* and enabled to court to effectuate California's sentencing scheme allowing for imposition of an upper term. In so doing, the court did not violate California law. Notably, in the wake of *Cunningham*, at least one California Court of Appeal decision authorized the use of jury findings for aggravating factors. See *Barragan* v. *Superior Court*, 148 Cal. App. 4th 1478, 56 Cal. Rptr. 3d 660 (2007). The California Legislature and the California Supreme Court subsequently opted for the alternative approach of giving the trial court broader discretion to select any of the three terms based on the jury's verdict alone. See *People* v. *Sandoval*, 41 Cal. 4th 825, 843-57, 161 P.3d 1146, 1162-67, 62 Cal. Rptr. 3d 588, 602-14 (2007). However, that decision did not invalidate earlier jury trials on aggravating circumstances. Rather, *Sandoval* decided against adopting the jury trial approach due to concerns that such jury trials could prove too complex and time-consuming in many cases. *Id.* at 843-57, 161 P.3d at 1162-67, 62 Cal. Rptr. 3d at

602-14. Petitioner's jury trial on aggravating factors did not violate state procedures.

4. Petitioner's challenge to California's system for imposing consecutive terms fails for a separate reason. California's system for selecting between concurrent and consecutive terms does not violate the rule of *Blakely* and *Cunningham* because either choice is available to the trial court based solely on the jury's guilty verdict on multiple counts. *People* v. *Black*, 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569 (2007). *Black* explained:

> The determination whether two or more sentences should be served in this manner is a "sentencing decision[] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense" and does not "implicate[] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense."

Id. at 823, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587.

California Penal Code section 669, governing imposition of concurrent or consecutive sentences, provides that only when the trial court fails to specify whether the imprisonment terms should run consecutively or concurrently, they must run concurrently. The California Supreme Court has explained that section 669's "requirement that concurrent sentences be imposed if the court does not specify how the terms run merely provides for a default in the event the court fails to exercise its discretion." *Black*, 41 Cal. 4th at 822, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587 (citing *People* v. *Reeder*, 152 Cal. App. 3d 900, 923, 200 Cal. Rptr. 479, 495 (1984)). Moreover, the trial court need not find facts to support its decision, it need only state the reasons for its selection. *Id.* This Court should not disturb this state court interpretation of state law. *Mullaney* v. *Wilbur*, 491 U.S. 684, 691 (1975)

("[S]tate courts are the ultimate expositors of state law [and] we are bound by their constructions except in extreme circumstances"); see also *Ring* v. *Arizona*, 536 U.S. 584, 603 (2002).

Instructively, the requirement of stating the reasons for imposing consecutive sentences contrasts with the requirement of factual findings to impose upper terms under the system examined by this Court in *Cunningham*. *Black*, 41 Cal. 4th at 823, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587. The requirement that a court state its reasons in making a sentencing decision simply "facilitates appellate review and imposes an intellectual discipline that may lead to better reasoned decisions." *Sandoval*, 41 Cal. 4th at 847, 161 P.3d at 1160 n.9, 62 Cal. Rptr. 3d at 605. (internal quotation marks omitted). There is nothing about a statement of reasons that implicates the right to jury trial. In fact, this Court in *United States* v. *Booker* did not delete the statutory provision requiring a statement of reasons when it severed other provisions in order to render the federal sentencing system compliant with the Sixth Amendment. *United States* v. *Booker*, 543 U.S. 220, 259-60 (2005); see 28 U.S.C. § 3553(c); *United States* v. *Fifield*, 432 F.3d 1056, 1064 (9th Cir. 2005).

Black distinguished decisions from other state supreme courts that held their states' consecutive sentencing systems violated *Blakely*, noting that in each of those states, the consecutive sentencing procedure "creates a presumption in favor of concurrent sentences that may be overcome only by factual findings," unlike in California, which has no such presumption or factfinding requirement. *Black*, 41 Cal. 4th at 822, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587.

The California Supreme Court's decision does not conflict with decisions in other jurisdictions. All the federal circuit courts considering the issue have rejected jury trial

challenges to the federal consecutive sentencing procedure (see 18 U.S.C. § 3584), which also does not require any additional factual findings to impose consecutive sentences. See *United States* v. *Fifield*, 432 F.3d at 1066-67; *United States* v. *Hicks*, 389 F.3d 514, 532 (5th Cir. 2004); *United States* v. *Pressley*, 345 F.3d 1205, 1213 (11th Cir. 2003); *United States* v. *Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States* v. *Lafayette*, 337 F.3d 1043, 1049-50 (D.C. Cir. 2003); *United States* v. *Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003); *United States* v. *Chorin*, 322 F.3d 274, 278-79 (3rd Cir. 2003); *United States* v. *Lott*, 310 F.3d 1231, 1242-43 (10th Cir. 2002); *United States* v. *Campbell*, 279 F.3d 392, 401-02 (6th Cir. 2002); *United States* v. *Feola*, 275 F.3d 216, 220 & n.1 (2d Cir. 2001). Further, several other state supreme courts have found no Sixth Amendment violation where a consecutive sentencing system, like California's, requires no additional factual finding to impose consecutive sentences and has no presumption of concurrent sentencing. *Smylie* v. *State*, 823 N.E.2d 679, 686 (Ind. 2005); *State* v. *Abdullah*, 878 A.2d 746, 756 (N.J. 2005); *State* v. *Cubias*, 120 P.3d 929, 931-32 (Wash. 2005); *State* v. *Jacobs*, 644 N.W.2d 695, 698-99 (Iowa 2001).

The only state supreme court decisions finding *Blakely* violated by consecutive sentencing involved statutes with presumptions of concurrent sentencing and/or a factfinding requirement to impose consecutive sentences. *State* v. *Ice*, 170 P.3d 1049, 1057-59 (Ore. 2007) (a consecutive sentence violates *Blakely* because "consecutive sentencing in this state is not simply a matter of judicial discretion, but can be imposed only after the sentencing judge has made certain legislatively required findings"); *In re Pers. Restraint of VanDelft*, 147 P.3d 573, 578-79 (Wash. 2006) (a non-serious, non-violent, consecutive sentence violates *Blakely* because it is an "exceptional sentence" requiring an aggravating factor to support it and because

Washington law has a presumption of concurrent sentencing); *State* v. *Foster*, 845 N.E.2d 470, 490-91 (Ohio 2006) (a consecutive sentence violates *Blakely* because of Ohio's rule that sentences be run concurrently absent judicial factfinding). Only one state supreme court has found its system *Blakely*-compliant despite a statutory presumption of concurrent sentencing absent additional factual findings. *State* v. *Keene*, 927 A.2d 398, 407 (Me. 2007); but see *id.* at 409 (Calkins, J., dissenting) (finding *Blakely* error because of the presumption).

This examination of the pertinent cases shows that, whether or not there is a significant conflict regarding *Blakely*'s impact on consecutive sentencing where the state has a presumption of concurrent sentencing and a requirement of an additional finding of fact, there is no conflict where, as in California, those features are lacking. Because *Black* accords with other courts' unanimous rejection of Sixth Amendment challenges in this scenario, certiorari should be denied.

II.

THE JURY'S FINDING OF FIVE AGGRAVATING FACTORS AND THE PRESENCE OF RECIDIVISM FACTORS AUTHORIZED THE TRIAL COURT TO IMPOSE THE UPPER TERM

Petitioner contends that two flaws remain in California's system for selecting the upper term after *Cunningham*. She argues California has interpreted the recidivism exception to *Blakely* and *Cunningham* too broadly, and asserts that California's elimination of the presumptive middle term was insufficient to resolve the constitutional problem identified in *Cunningham*. Pet. at 21-25. These claims do not warrant a grant of certiorari.

A. Reliance On Recidivism Factors Does Not Violate The Sixth Amendment

Petitioner's challenge to the appellate court's affirmance based on the increasing seriousness of the prior and current convictions as falling within the recidivism exception to *Blakely* and *Cunningham* should be denied for four independent reasons: (1) there is no lower court conflict on this issue; (2) the court's decision was correct; (3) the relevant language in the sentencing statute at issue has been deleted; and (4) it is unnecessary to reach this question under the facts of this case. See Sup. Ct. R. 10.

1. This Court has repeatedly affirmed that a defendant does not have a right to a jury trial for increased punishment based on the fact of a prior conviction. In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), this Court addressed a claim that the defendant had the right to have the prosecution charge as an element in the indictment a statutory provision increasing the punishment based on a judicial finding that a deported alien who returned to the United States had a previous aggravated felony. *Id.* at 226-29. Reviewing past precedent, this Court explained that the "sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. This Court specifically noted that "the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of the recidivism, is independently unlawful)." *Id.* at 230. Given this backdrop, the Court concluded that the criminal statute's subject matter, recidivism, should not be treated as an element of an offense and need not have been charged in the indictment. *Id.* at 247.

Citing *Almendarez-Torres*, this Court in *Apprendi*

excluded "the fact of a prior conviction" from the general rule requiring any fact increasing the penalty beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 489-90. This Court explicitly retained the *Almendarez-Torres* exception in *Blakely* and *Booker*, and did so again in *Cunningham*. *Cunningham*, 127 S. Ct. at 860, 864, 868; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; see also *Rita* v. *United States*, 127 S. Ct. 2456, 2486 n.1 (2007); *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007); *Rangel-Reyes* v. *United States*, 126 S. Ct. 2873, 2874 (2006) (Stevens, J., respecting the denial of certiorari) ("[C]ountless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.").

There is no conflict between the California Supreme Court's interpretation in *Black* and other lower courts in their subsequent interpretation of the scope of the *Almendarez-Torres* exception. Federal circuit courts have overwhelmingly relied on the recidivism rationale of the *Almendarez-Torres* exception to find that it goes beyond the literal fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant's incarceration in relation to subsequent offenses. For example, the Second Circuit has held that the exception allows a trial court to find "not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the 'who, what, when, and where' of a prior conviction." *United States* v. *Santiago*, 268 F.3d 151, 156 (2d Cir. 2001); see also *United States* v. *Fagans*, 406 F.3d 138, 142 (2d Cir. 2005) ("the type and length of a sentence imposed seem logically to fall within this exception"). The

Eighth Circuit has held that the prior conviction exception applies to "sentencing-related circumstances of recidivism," and has agreed with the Second Circuit's opinion in *Santiago* "that it is entirely appropriate for judges to have 'the task of finding not only the mere fact of previous convictions but other related issues as well.'" *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir. 2002). The Tenth Circuit has held that "the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under court supervision when he or she committed a subsequent crime." *United States* v. *Corchado*, 427 F.3d 815, 820 (10th Cir. 2005).

Several state courts of last resort have likewise found that the prior conviction exception includes such facts relating to recidivism. The Maryland Court of Appeals observed that the prior conviction exception "is not limited solely to prior convictions. The general rule is that there is no right to a jury trial on matters related to the broader issue of recidivism." *State* v. *Stewart*, 791 A.2d 143, 151-52 (Md. 2002). The Supreme Courts of Washington, Connecticut, Indiana, and Minnesota have held that the exception includes the issue of whether the defendant was on probation at the time of the current offense. See *State* v. *Jones*, 149 P.3d 636, 640-41 (Wash. 2006); *State* v. *Fagan*, 905 A.2d 1101, 1121 (Conn. 2006); *Ryle* v. *State*, 842 N.E.2d 320, 323-25 (Ind. 2005); *State* v. *Allen*, 706 N.W.2d 40, 47-48 (Minn. 2005). Because the California Supreme Court's interpretation of the *Almendarez-Torres* exception as involving recidivism is in line with the other state and federal court decisions, certiorari is inappropriate.

2. Furthermore, the appellate court's specific application of the exception does not conflict with this Court's authority. The California Court of Appeal observed that petitioner's upper term sentence was authorized based on the trial court's finding that her convictions were of

increasing seriousness. Cal. Ct. R. 4.421(b)(2). The record showed that petitioner had previous convictions for felony welfare fraud in 1997 and check fraud in 1999. (C.T. 552; R.T. 4470-73, 4488-90.) In her current case, petitioner was convicted of ten counts of grand theft, two counts of conspiracy and one count of receiving stolen property, with an enhancement that the fraud involved a taking over $500,000. (C.T. 544-49; R.T. 4530-33.) The two prior isolated crimes, when compared both to the number of current offenses found true by the jury and the significant financial losses determined by the jury, were sufficient to establish the increasing seriousness of her offenses, without the need for any finding beyond the fact of the prior convictions and the current jury verdicts. See *Black*, 41 Cal. 4th at 818-20, 161 P.3d at 1142-44, 62 Cal. Rptr. 3d at 583-85 (contrasting relative seriousness between prior crimes and current offenses).

The California Supreme Court explained in *Black* that whether the defendant's prior convictions were numerous or of increasing seriousness fell under the *Almendarez-Torres* exception. *Black*, 41 Cal. 4th at 819-20, 161 P.3d at 1143, 62 Cal. Rptr. 3d at 585. It reasoned that these findings

> require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.

Id. (internal quotation marks omitted).

In support of this reasoning, *Black* cited, inter alia, the Sixth Circuit's decision in *United States* v. *Smith*, 474 F.3d

888 (6th Cir. 2007). *Black*, 41 Cal. 4th at 819, 161 P.3d at 1143, 62 Cal. Rptr. 3d at 584. In *Smith*, the federal circuit court approved the district court's deviation from the federal guidelines range based on the recidivist finding that the defendant's criminal history was "extensive and egregious." *Smith*, 474 F.3d at 892. The court found that the *Almendarez-Torres* exception was "wide enough to encompass the district court's finding here." *Id.* at 891.

Like the finding in *Smith* that the defendant's criminal history was extensive and egregious, the trial court's finding in this case that petitioner's prior convictions were of increasing seriousness fell under the *Almendarez-Torres* exception for recidivist facts. A court's evaluation of whether a defendant's prior convictions are serious is just as much a traditional consideration at sentencing as the finding of the prior convictions themselves. The *Almendarez-Torres* rationale for excluding "recidivism" from being considered elemental applies equally to this evaluation. The state court's application of the *Almendarez-Torres* exception to *Cunningham* was correct.

3. The statute petitioner was sentenced under in this case, California Penal Code section 1170(b), was amended to comply with *Cunningham* and no longer requires any fact-finding to impose the upper term. See *Sandoval*, 41 Cal. 4th at 849-50, 161 P.3d at 1162, 62 Cal. Rptr. 3d at 607-08. Thus, the question of whether prior convictions of increasing seriousness or numerousness falls under this Court's recidivism exception is one that has no prospective relevance in California. See R. Stern et al., Supreme Court Practice 247 (9th ed. 2007).

4. Finally, the resolution of this question would have no impact on this case because the trial court also relied on the five aggravating factors found true by the jury, in compliance with *Blakely* and *Cunningham*. In *Black*, the California Supreme Court explained that an upper term

sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." *Black*, 41 Cal. 4th at 812, 161 P.3d at 1138, 62 Cal. Rptr. 3d at 578. The court explained, "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." *Id.* at 813, 161 P.3d at 1138-39, 62 Cal. Rptr. 3d at 579 (citing *People* v. *Osband*, 13 Cal. 4th 622, 728, 919 P.2d 640, 709, 55 Cal. Rptr. 2d 26, 95 (1996)). Further,

> so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.

Black, 41 Cal. 4th at 813, 161 P.3d at 1138, 62 Cal. Rptr. 3d at 579 (citing *Rita* v. *United States*, 127 S. Ct. at 2465-66, *Blakely*, 542 U.S. at 309, *Apprendi*, 530 U.S. at 481-82, and *Harris* v. *United States*, 536 U.S. 545, 558, 560 (2007)).[2/] An aggravating circumstance accords with the right to jury trial if it was based on the defendant's criminal history or a fact found by the jury. *Black*, 41 Cal. 4th at 815, 161 P.3d at 1140, 62 Cal. Rptr. 3d at 581.

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2. Petitioner does not challenge the validity or the constitutionality of the California Supreme Court's holding on this point.

Given that only one *Blakely*-compliant aggravating circumstance was necessary to authorize the upper term, petitioner's sentence was constitutional in light of the five factors found by the jury, without regard to the trial court's reliance on the recidivist aggravating factor at issue. Thus, this issue cannot affect the outcome of this case, making a grant of certiorari inappropriate. See R. Stern et al., Supreme Court Practice at 248 (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964)).

B. Petitioner's Challenge To California's Reformed Sentencing System Is Not Justiciable

1. Petitioner also challenges California's sentencing scheme, contending that the judicial and statutory reforms imposed in response *Cunningham* did not resolve the constitutional problems identified in *Cunningham*. However, petitioner was sentenced by the trial court on January 5, 2006, before certiorari was granted in *Cunningham*. Petitioner was not sentenced under the post-*Cunningham* revised sentencing system, and that revised system has never been applied to her. Accordingly, petitioner's claim is not presented on the record in this case.

This Court may not issue advisory opinions, because "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). The controversy "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 241 (1937). For a party to have standing to bring a case before this

Court, "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

The state court has not ordered petitioner resentenced under a reformed statutory system. Thus, this case presents no controversy over the propriety of such a procedure under the Constitution. This Court does not sit to redress hypothetical injury. Even if this Court granted certiorari and reversed the California court's judgment, and even if the state court on remand ordered resentencing under the reformed system in *Sandoval*, it is unknown whether petitioner would receive the upper term or a lesser sentence. Thus, the question is not ripe for this Court's consideration. See generally *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726, 732-33 (1998); *Anderson* v. *Green*, 513 U.S. 557, 559 (1995).

2. In any event, the California Supreme Court's elimination of the factfinding requirement by deleting the middle term presumption in the California determinate sentencing law, and application of this amended system to resentencings, is analogous to this Court's elimination in *Booker* of the factfinding requirement by deleting the mandatory aspect of the federal guidelines, and application of that amended system to resentencings. Compare *Booker*, 543 U.S. at 259-60, 268, with *Sandoval*, 41 Cal. 4th at 852-57, 161 P.3d at 1164-67, 62 Cal. Rptr. 3d at 609-14. The California Supreme Court noted, "[r]elying upon the principles established in *Rogers* [v. *Tennessee*, 532 U.S. 451 (2001)], every federal court that has considered the issue has rejected the argument that application of the United States Supreme Court's 'remedial interpretation' of the

federal sentencing statutes in [*Booker*] to cases pending on appeal would deny due process of law." *Id.* at 857-58, 161 P.3d at 1167, 62 Cal. Rptr. 3d at 613-14 (citing cases). Petitioner was put on notice by the state statute that she could receive the upper term, so application of the California Supreme Court's subsequent judicial construction of the statute does not violate ex post facto or due process principles. *Id.* (citing *Rogers*, 532 U.S. at 460-61, 464, 466); see *United States* v. *Lata*, 415 F.3d 107, 110-12 (1st Cir. 2005). *Sandoval* is consistent with the uniform and correct resolution of this issue in the federal courts.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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